United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Docket Number 75-7356

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
- -X

In the Matter of the Arbitration
between

ROBERT P. HERZOG

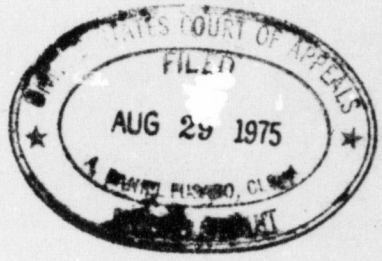
Petitioner-Appellee

v.

FRANK ROBINSON

Respondent-Appellant

- -X



APPEAL
FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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STATUTES

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STATEMENT OF THE ISSUES

Appellant Robinson presents the following issues for review:

Whether the District Court judgment should be reversed and the Arbitration Award vacated because:

a) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made;

b) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, and in refusing to hear evidence pertinent and material to the controversy; and of other misbehavior by which the rights of the appellant have been prejudiced;

within the meaning of Title 9, Sections 10(c) and (d) of the United States Code.

STATEMENT OF THE CASE

Preliminary Statement

Appellant Frank Robinson ("Robinson") appeals from a judgment of the United States District Court for the Southern District of New York (MacMahon, J.) entered May 14, 1975 which granted the application of appellee Robert P. Herzo[illegible]rzog") for an order confirming an arbitration award dated November 27, 1974 ("Award") and which denied Robinson's application for an order vacating the Award.

Robinson urged the District Court to vacate the Award, and deny confirmation thereof, because the arbitrators shirked their responsibility to decide the entire dispute submitted. The arbitrators imperfectly executed their powers and failed to make a mutual, final and definite award on the matter in dispute. The arbitrators' failure in this respect resulted in large measure from the arbitrators' failure to postpone the hearings to permit the joinder of all parties needed for just adjudication ("necessary parties"). The arbitrators also failed to postpone the arbitration hearings to permit Robinson's newly engaged counsel to prepare adequately for the arbitration and they failed to permit reasonable discovery under the circumstances. The effect of the arbitrators' actions resulted in the foreclosure of evidence pertinent and material to the controversy. All of the foregoing insured that the proceedings lacked overall fairness to Robinson's prejudice. Finally, Robinson urged vacation of

the Award because the arbitrators exceeded their powers by granting a forfeiture and penalty of $50,000 contrary to public policy.

The chronological factual statement which follows will permit an understanding of the applicability of the statutory grounds for vacation of an Award found in 9 USC Section 10. The statement is based on the Record filed in this Court which, inter alia, contains the complete transcripts of, and the briefs and exhibits introduced at the arbitration hearings as well as the pre-arbitration hearing correspondence, the closing briefs of the parties in the arbitration proceedings and the affidavits and briefs submitted to the District Court.

In this Statement of the Case, and in the Argument which follows, appropriate reference is made to that documentary record material which is printed in the Appendix by placing the Appendix page number on which said material appears in parentheses e.g. "(8)" refers to page 8 of the Appendix. References to any portion of the Record which is not printed in the Appendix is made by placing in parentheses the letter "R" followed by the "Identifying Mark" of such document set forth in the "Index to the Record on Appeal" filed in this Court and a notation of the relevant portion of said document e.g. "(R 13B Ex 1") refers to the Exhibit marked 1 which is attached to, and bound with, the document having the "Identifying Mark" of 13B (Transcript of hearing

of July 15, 1974) in the "Index to the Record on Appeal". To further simplify notation, reference to any of the 565 pages of the transcript of the arbitration hearings (which are found in documents with Identifying Marks "13B", "13C", and "13D") is made merely by placing in parentheses the abbreviation "Tr" and the page number of said transcript.

The Moratorium Agreement

Robinson, a California resident, is the President of Frank Robinson Advertising, Inc. ("FRA") a California corporation. In 1972 FRA, then having cash flow difficulties, entered into a Moratorium Agreement (Tr 111, R 13C Ex B) with certain of its creditors ("Moratorium Creditors") which provided that FRA would pay the creditors' claims in installments over the following year.

Other signatories to the Moratorium Agreement included Plastimaid, Inc. ("Plastimaid"), a California corporation, which signed as "Guarantor"; Robinson, who pledged his shares of both FRA and Plastimaid as collateral security without personal liability; several creditors; and a Creditors' Committee ("Committee") of which Herzog, a New York attorney, was counsel and secretary and (together with James A. Jurist ("Jurist")) one of the Trustees. Herzog, was not a creditor of FRA. The Moratorium Agreement provided for arbitration of disputes thereunder by the American Arbitration Asscciation ("AAA") in New York or Los Angeles.

The Offer

In the summer of 1973 FRA (not Robinson as Judge MacMahon's memorandum (162) states) defaulted in payments under the Moratorium Agreement (Tr 146). To prevent foreclosure of the collateral Herzog and Robinson's then California attorney, Gary Plotkin ("Plotkin"), together with Robinson, negotiated an Offer dated August 27, 1973 ("Offer") addressed to the creditors under which the arbitration involved herein arose (4). The Offer,

which indicated (8) that it was to be substituted for the Moratorium Agreement, if accepted by "the requisite amount" of FRA's creditors, provided under alternative plans for payment to FRA's creditors (then numbering approximately 200) either in cash or in cash and notes.

As part of the Offer, and as evidence of Robinson's bona fides, Robinson was required to deposit collateral with Herzog consisting of a $50,000 promissory note secured by a deed and an assignment of a lease (6). The collateral would be "forfeited" to the FRA creditors "to the extent of $50,000 after expenses" (7) if Robinson failed to deposit the necessary cash and notes to effectuate the Offer after its acceptance.

The Offer also included provisions whereby:

(i) accepting creditors would release Robinson from any and all personal liabilities, if any, arising out of FRA's or Plastimaid's obligations (6);

(ii) accepting creditors would agree to return to Robinson the Plastimaid stock which he pledged under the Moratorium Agreement (7); and

(iii) accepting creditors would agree to arbitration in New York or Los Angeles (8).

The Offer required acceptance by November 30, 1973 by 80% of "the amount of" FRA's creditors (5, 6).

The Offer was signed by Robinson and (as to the collateral and without personal liability) by Robinson's wife Mari-Jo (8). No other party to the Moratorium Agreement (any creditor, the Committee, Herzog, Jurist, FRA or Plastimaid) subscribed to the Offer.

Herzog, as Escrowee thereunder, did sign a separate Escrow Receipt for the collateral (Tr 323).

The Dispute as to "Acceptance"

The verbatim text of Offer was never circulated to FRA's creditors (63, 65). Instead Herzog prepared, and mailed to creditors, a Summary (9) thereof dated September 14, 1973 ("Summary"). Accompanying the Summary was a blank form (12) which each creditor was requested (10) to return to Herzog after signifying its "acceptance" of the Offer and its choice between the alternative payment plans.

The Summary omitted certain terms and conditions of the Offer, differed in certain respects from the Offer and contained ambiguities. Indeed Herzog stated at the arbitration that the Summary was "incorrect" (67) in at least one significant respect in that it indicated that FRA (10), rather than Robinson (67), was to be the obligor of the notes. The differences, omissions and ambiguities, are significant because they raised the question as to whether there was ever a "meeting of the minds" between Robinson, as Offeror, and the "accepting" creditors which would permit acceptance of the Offer. This question of "acceptance" was one of the questions submitted to the arbitrators.

The dispute on "acceptance" as finally submitted to arbitration, had the following aspects:

a) Whether Herzog's Summary correctly set forth all of the essential terms and conditions of the Offer.

b) The understanding of the "accepting" creditors as to the meaning of the Offer at the time of "acceptance".

c) Whether there was a "meeting of the minds" between Robinson and the "accepting" creditors.

d) Whether the terms of the Offer required acceptance (i) by 80% of the number of creditors, or (ii) by such number of creditors as held 80% of the dollar amount of the claims, or (iii) by 80% of creditors both in number and in dollar amount. This question arose because the Offer referred to "acceptance" in seven places in varying terms (5, 6, 7, 8). The nature of the requirement for "acceptance" was crucial because, as Herzog admitted at the hearing (Tr 383), 80% in number of creditors did not "accept" the Offer. It was in dispute at the hearing whether acceptance by creditors holding 80% in dollar amount of claims was achieved.

e) Whether the Offer was "accepted" by the requisite number of creditors before it expired on November 30, 1973.

Pre-Hearing Arbitration Procedures

Robinson disputed whether the Offer had been accepted (232). When the cash and notes necessary to effectuate the alternative payment plans were not deposited with Herzog, Herzog on February 4, 1974 (13) demanded that Robison arbitrate the dispute in New York and claimed that "$50,000 together with expenses"

had been forfeited due to "Breach" of the Offer. In the Demand (13, 14) Herzog identified the nature of his interest as a "Party to an Arbitration Agreement" and an "Escrowee under Agreement". Herzog did not claim to be the attorney for any of the "accepting" creditors. Herzog has never claimed that his actions in the arbitration would bind these creditors in any respect. Despite this apparent disability, Herzog did not serve the Demand upon, nor join as parties to the arbitration, either Mari-Jo Robinson (who subscribed to the Offer) or the "accepting" creditors of FRA (who would have been parties to any agreement into which the Offer would have matured, if accepted by the requisite number of creditors). Nor did Herzog attempt to join, as parties to the Arbitration, any of the other parties to the Moratorium Agreement, (FRA, Plastimaid, FRA's other creditors, the Committee, or Jurist) most, if not all, of whom had an interest in the outcome of the arbitration, if the Offer had been accepted.

The AAA thereupon instituted its arbitration procedures. Plotkin, Robinson's attorney attempted to have the venue changed to Los Angeles County; the AAA denied this request. To suit the convenience of Plotkin (Tr 18) who would be in Bermuda for a Commercial Law League Convention commencing July 6, 1974 (which Herzog also attended) the AAA set the dates of hearing for July 15 and 16, 1974 after Plotkin had agreed, at Herzog's insistence, that those dates be made "peremptory, final and not further adjournable against" Robinson (Tr 18-20).

Shortly before the scheduled date of the arbitration,

it became apparent to Robinson, after inquiry of Plotkin as to his preparation for the arbitration, that Plotkin would be unable to represent Robinson adequately (Tr 23). By substitution dated July 5, which was accepted by Plotkin's firm, Robinson retained Daniel L. Rothman ("Rothman"), a Los Angeles attorney, as his new counsel. Bernard Rackear, Professional Corporation ("BRPC") was thereupon associated with Rothman as New York counsel (R 13B Ex 1).

The Requests for Adjournment

Rothman and BRPC soon determined the complexity of the case, the need for extensive preparation both as to the facts and the law, and the lack of prior preparation. Plotkin and Herzog were then in Bermuda and unavailable. Accordingly, Robinson on July 9 delivered to the AAA a request for a one month adjournment in hearing date which the Arbitrators promptly denied (R 13B Ex 4). Thereafter, Herzog refused a Robinson request to inspect the "Acceptances" to the Offer before July 15, the scheduled date of the arbitration hearing (Tr 10).

On July 12 Rothman became ill and was hospitalized in California for five days (R 13B Ex 6). Herzog on July 13 refused to consent to BRPC's request for an adjournment of the July 15 hearing on this ground (Tr 13).

Accordingly, Robinson flew in to New York from California and together with BRPC appeared at the July 15 hearing at which time Robinson requested a three week adjournment based upon both the need to prepare the case and Mr. Rothman's illness (Tr 16).

The arbitrators agreed to adjourn the hearing for two weeks to July 29 and 30 and stated that they would deny any further requests for adjournment (Tr 33).

Before adjournment Robinson advised the arbitrators of his view that the proceeding was defective for lack of joinder of the parties to the purported agreement and observed that Herzog did not appear as a representative of any of the creditors but merely appeared as a stakeholder (Tr 41). Robinson also informed (Tr 40) the arbitrators that an issue existed as to whether the number of "Acceptances" met the pre-condition (8) for arbitration. The arbitrators suggested that Robinson submit a brief on each of these points (Tr 40). No testimony on the merits was taken on July 15.

The Pre-Hearing Motions

Following the hearing on July 15, Herzog, at the arbitrators' direction (Tr 36), permitted Robinson to examine the "acceptances". Robinson found that many were questionable and suspicious. Accordingly, Robinson requested the arbitrators to issue an order permitting Robinson to depose Herzog in New York to develop all facts with respect to the "acceptances". Robinson also requested an order permitting him to depose Plotkin (who was unwilling to appear at the arbitration in New York but who was willing to be deposed in Los Angeles) before the July 29 hearing (R 8 Ex VIII). Herzog opposed these depositions (R 13A Ex (r)) and the arbitrators denied these requests. (The District Court's statement (165) that Robinson could have deposed Herzog and Plotkin at any time prior to July 29 is unsupported either by the Record or in fact).

At the beginning of the July 29 hearing Robinson again raised (Tr 53) and submitted memoranda on, the threshhold questions of (a) joinder and (b) whether the number of the "Acceptances" met the condition precedent (8) to establish a consent to arbitration.

Robinson's memorandum on joinder (17) pointed out that an issue existed as to whether there was a "meeting of the minds" between Robinson and "accepting" creditors. The brief suggested that this issue could only be resolved by the testimony of the "accepting" creditors, and not by the testimony of Herzog and Robinson alone. The memorandum (18) also stated that an issue existed as to the enforceability of the forfeiture provisions of the Offer against Robinson. Moreover, the memorandum invited attention (19) to the possibility of double, multiple or otherwise inconsistent obligations to which Robinson might be exposed by reason of conflict between the Award of the arbitrators and the judgments of other forums in which parties who were not joined may seek relief.

Robinson had concern that, in the absence of joinder, the disputes between Robinson and the creditors would not be, and could not be, resolved. Any Award rendered would lack mutuality and finality in that the Award could not have a binding effect (Tr 57) against any "accepting" creditor who was not joined in the arbitration, although it could bind Robinson and work a collateral estoppel against Robinson in favor of "accepting" creditors in any subsequent proceeding in which they were parties.

The Award would also lack finality in the absence of the joinder of Mari-Jo Robinson because of her community property interest in the property sought to be forfeited which would require, in order to bind her and foreclose her interest, a redetermination of all issues in a subsequent proceeding in which she was a party.

Robinson's memorandum pointed out (20) that the arbitration clause made joinder feasible and that such joinder was relatively simple, expeditious and inexpensive. Finally, the memorandum pointed out (21, 22) that the "accepting" creditors were the real parties in interest and therefore entitled to notice of the time and place of the hearing and an opportunity to participate under New York CPLR 7506(b) and the AAA Commercial Arbitration Rules and that, in the absence of such notice to them, they could move to vacate any Award affecting their rights.

Robinson therefore moved (16, 36) to adjourn the proceedings to permit the joinder of the other necessary parties (the "accepting" creditors and Mari-Jo Robinson). Alternatively, Robinson moved (16, 36) to dismiss the proceeding in the absence of such joinder, without prejudice to renewal upon proper joinder. It is observed that such an adjournment or dismissal for the purpose of joinder would not have prejudiced Herzog or the "accepting" creditors in any respect since they were at all times fully secured by the deposit (6) and pledge of the collateral sought to be "forfeited".

Herzog opposed the Robinson motions (45).

The arbitrators denied Robinson's motion for an adjournment to permit joinder (46); they reserved decision as to whether

to dismiss the proceeding for lack of joinder (46, 47). They also reserved decision as to whether the proceeding should be dismissed by reason of fewer than 80% "acceptances" from creditors being obtained (47, 103). They did not rule on either reserved question prior to the Award (113); the Award, while not ruling specifically on these motions, can only be read as a denial thereof.

Robinson's Answer and Counterclaim

Before testimony was taken Robinson denied the allegations of the Demand and counterclaimed (15, 42) for return of the promissory note and collateral in view of his claim that the Offer did not ripen into an agreement.

The Hearing

The arbitrators then proceeded to take evidence. Herzog was the only witness on his direct case and his direct testimony and cross-examination made up the bulk of the testimony taken at the hearing (Tr 99-382). Herzog testified as to the background of the Moratorium Agreement and Offer, the circumstances surrounding the drafting of the Offer, the procedures to secure creditor consent thereto, and the alleged default thereunder. Cross-examination of Herzog pointed up the ambiguities in, and differing constructions of, the Offer and the Summary including (a) whether Robinson or FRA was to be the party legally liable for performance of the alternative plans and the obligor of the notes; (b) whether the Moratorium Agreement remained in effect if the Offer had been accepted and a default thereafter occurred

in depositing the required cash and notes; and (c) the identity of the creditors entitled to participate in the "forfeiture". The cross-examination also raised questions as to (a) whether there was a "meeting of the minds" between Robinson and the "accepting" creditors; (b) whether the purported consents were actually signed by the "accepting" creditors; and (c) the dates of such signing. During the course of such cross-examination one arbitrator observed that the date of signing of any consent (Tr 283) could only be impeached by securing the testimony of the signer thereof; proof by other evidence (Tr 284) was ruled out.

When it appeared on Herzog's cross-examination that Herzog's construction of the Offer could result in Robinson having a liability to creditors in excess of $50,000, one arbitrator (Tr 347) asked both parties to stipulate that Robinson's liability, if any, would be limited to $50,000. Rothman pointed out that such a stipulation would not be acceptable to Robinson (Tr 348) because Herzog, who only appeared as escrowee, was not in a position to bind the creditors and the creditors had not been joined in the proceeding. Rothman pointed out (Tr 356) that other issues were before the Arbitrators such as whether, if the Offer was accepted, there was a novation of the obligation resulting in the termination of the Moratorium Agreement or whether the obligations under the Moratorium Agreement remained in effect. In this connection an arbitrator observed (Tr 358) that the question of whether there was a novation and whether the Moratorium Agreement was still in effect could not be ruled on in this proceeding in the absence of the joinder of the parties to the Moratorium Agreement. Rothman

reminded the arbitrators that the question about the joinder of parties had been raised and was still pending (Tr 358).

The colloquy set forth on pages 89-102 of the Appendix (Tr 362-375) then took place and the arbitrators thereafter denied Robinson's request to interpose a further counterclaim seeking the return of the collateral pledged under the Moratorium Agreement (Tr 373) in the event it was found that the Offer had been accepted.

Robinson on his direct case testified as to his understanding of the meaning of the Offer. Robinson also testified as to claim letters received subsequent to November 30, 1973, from, or on behalf of, "accepting" creditors, which made claim for the full amount of the creditor's claim, rather than the 10% or 25% allegedly due under the Offer. These letters were significant because they tended to show that these creditors had either not accepted the Offer or had withdrawn their acceptance. Finally, Robinson testified (Tr 515) as to 15 lawsuits brought by creditors against FRA since the Moratorium Agreement. Rothman indicated that 32 lawsuits were pending (Tr 514). This is significant because it indicated the multiplicity of suits to which Robinson was exposed. Robinson also submitted a three page affidavit by Plotkin as part of his case.

Herzog was called on Robinson's case to testify as to certain aspects of the Moratorium Agreement.

Herzog called Jurist in rebuttal to testify about Herzog's phone conversations with Jurist previous to the drafting of the Offer.

The Arbitrators closed the evidentiary part of the

proceeding on July 30 (Tr 553). Briefs were exchanged in the following three months. Robinson's briefs (R 8 Exs X, XII) pointed to the broad issues involved and the necessity for joinder to determine the rights of parties to the Offer not involved in the proceeding. The proceedings were closed on November 4. The Award dated November 27 (118) was transmitted to the parties on December 4, 1974.

The Award

The Award (118) provides that Robinson shall pay to Herzog $50,000 (¶1). In addition, it requires Robinson to pay the compensation of the arbitrators of $900 (¶2), the AAA administrative fees of $1,300 (¶3), and Herzog's out-of-pocket costs to perfect and sell (if necessary) the collateral (¶4). It permitted Robinson until 5:00 P.M. on January 3, 1975 (¶5, ¶6) to make such payments, failing which Herzog is permitted to sell the collateral and apply the proceeds to satisfy the foregoing payments with any excess to be paid by Herzog to Robinson (¶7) and any insufficiency to be paid by Robinson to Herzog (¶8). Further, the Award provides that Robinson shall have no further liability to Herzog under the Offer (¶9) and that the Award does not affect the rights of any persons under the Moratorium Agreement of October, 1972 (¶10). Finally, the Award states it is in "full settlement" of the issues tendered by the Demand and by the Counterclaim (¶11).

The Award can only be read as holding that the arbitrators found there was a "meeting of the minds" and that the Offer had been accepted by the required number of creditors. Yet the

Arbitrators do not explain the apparent impossibility of this conclusion in view of the fact that said creditors did not receive the Offer but merely received a Summary thereof differing therefrom in substantial respects and in the absence of the testimony of any such creditor.

Despite an outward appearance of definiteness of the Award in that it provides for an absolute payment to Herzog, it appeared to Robinson (155-157) that the Award failed to resolve the dispute, failed to meet the statutory requirements of definiteness and that it was flawed in the following respects:

(a) The Award does not set forth the identity or class of creditors entitled to participate in the Award. In this respect the Offer provides (7) for forfeiture to FRA's "existing creditors". During the arbitration the question was raised as to whether the term "existing creditors" meant all of FRA's creditors or only those creditors who had accepted the Moratorium Agreement ("Moratorium Creditors") or only those Moratorium Creditors who had "accepted" the Offer, or some other group of creditors (Tr 276, 277). The Summary (10) does not cast any light on this question. The Award is also totally silent on this matter and apparently leaves to Herzog's absolute discretion the determination as to which creditors are entitled to participate in the Award.

(b) Moreover, the Award is indefinite in that it does not require Herzog to pay the entire $50,000, or any part thereof, to anyone. The Award does not indicate whether Herzog is entitled to retain any part of the $50,000 and if so, what effect this retention has upon any remaining obligations that Robinson may have to the "accepting" creditors or upon any remaining obligation that FRA or Plastimaid has to the Moratorium or other creditors.

(c) If the Award intends that the entire $50,000, or any part thereof, is to be paid to some group of creditors to be credited against amounts owed such creditors, then is such credit to be made against the reduced amount owed under the Offer, or is it to be made against the balance of the original debt owed under the Moratorium Agreement, or is it to be treated in some other way? Further, if the $50,000 is to be treated as a payment on account, who is responsible for payment of the balance? Robinson urged that if the Offer by "acceptance" ripened into an agreement, that the Offer replaced the Moratorium Agreement by its terms thus resulting in a novation of the obligation and that the new obligation was FRA's rather than Robinson's, except to the extent of $50,000 after expenses.

Herzog, on the other hand, contended that Robinson, not FRA, was obligated for the full performance of the Offer; that the Offer was breached after acceptance and that therefore, the Offer "fell" and the Moratorium Agreement was reinstated. Herzog's view was that Robinson was to forfeit $50,000 and the creditors were restored to (or retained) their rights under the Moratorium Agreement. Moreover, Herzog suggested that these creditors may be entitled to pursue Robinson personally for the deposit of the notes and/or cash required by the Offer. The Award, however, leaves all of these questions unanswered and all of these issues unresolved.

(d) One of the major issues raised before the arbitrators was whether the $50,000 forfeiture clause was an unenforceable and illegal penalty. Further, Robinson urged that if the forfeiture provision were held to be, under either California or New York law, a valid liquidated damage provision, rather than a penalty, that such a holding would require the additional conclusion that the Award of the $50,000 forfeiture is, and will be, the sole remedy of the creditors; and that no other or greater

damages could be awarded for the claimed breach even though the actual damages which the creditors might suffer would exceed the stipulated sum. Yet the Award is entirely silent as to this major issue.

The Motions to Confirm and Vacate

After the Award was rendered Herzog moved to have the Supreme Court of New York County confirm the Award, but failed to effect the required personal service on Robinson. Robinson moved in that court to dismiss Herzog's motion for lack of jurisdiction over his person. When it became apparent that the New York courts would not render a decision on Robinson's motion before the expiration of the 30 day statutory removal period, Robinson removed the action to the United States District Court for the Southern District of New York where he renewed his motion to dismiss. Herzog thereafter moved in the District Court to confirm the Award and effected personal service of his Federal Court motion on Robinson in California. After such service, Robinson, by stipulation and order, withdrew his motion to dismiss and thereafter cross-moved to vacate the Award. In support thereof Robinson submitted the Affidavit (121) of his New York attorney, Bernard Rackear, which was keyed to, and accompanied by, the pre-hearing correspondence, the transcripts of, and the exhibits introduced at, the arbitration hearings, and the closing briefs of the parties. Herzog's opposing affidavit (160) denied generally, and without specification, all of the allegations in the Rackear Affidavit.

The District Court heard oral argument on March 7; its memorandum opinion (162), which granted Herzog's motion and denied Robinson's motion, was filed May 2. Judgment (168) thereon was entered May 14. This appeal followed.

ARGUMENT

SUMMARY OF ARGUMENT

The Court should reverse the judgment below and direct that the Award be vacated. The District Court erred in confirming, rather than vacating, the Award because:

A. The arbitrators shirked their responsibility to decide the entire dispute submitted. Robinson was prejudiced by the arbitrators' misconduct and misbehavior -

(1) in refusing to postpone the hearing to permit the joinder of additional parties,

(2) in refusing to hear, and by foreclosing, evidence pertinent and material to the controversy,

(3) in refusing to postpone the hearing to permit newly engaged counsel to prepare adequately for the case and in failing to order the requested depositions prior to the hearing.

B. The arbitrators imperfectly executed their powers upon the subject matter submitted by failing to make an Award that was

(1) mutual,

(2) definite, and

(3) final.

C. The arbitrators exceeded their powers by awarding a forfeiture and penalty of $50,000 contrary to public policy.

THE ARBITRATORS SHIRKED THEIR RESPONSIBILITY TO DECIDE THE ENTIRE DISPUTE SUBMITTED. ROBINSON WAS PREJUDICED BY THE ARBITRATORS' MISCONDUCT AND MISBEHAVIOR
(1) in refusing to postpone the hearing to permit the joinder of additional parties,
(2) in refusing to hear, and by foreclosing, evidence pertinent and material to the controversy,
(3) in refusing to postpone the hearing to permit newly engaged counsel to prepare adequately for the case and in failing to order the requested depositions prior to the hearing.

The Failure to Join

The arbitrators denied Robinson's motions to postpone the hearing and to dismiss the proceedings, without prejudice, to permit the joinder as parties of the "accepting" creditors and Mary-Jo Robinson. Under the circumstances these denials constituted such misconduct and misbehavior to Robinson's prejudice as would require vacation of the Award.

The District Court's memorandum opinion (164) states that there was no need to join the "accepting" creditors because they were bound by the arbitrators' decision since "Herzog acted as the authorized representative of the creditors in the arbitration". The District Court's factual premise is unsupported by the record of the arbitration proceedings and accordingly the Court's legal conclusion falls.

The Record fails to show that Herzog was the "authorized representative" of any creditor in the sense that any creditor authorized Herzog to initiate the arbitration or that any creditor authorized Herzog to bind such creditor's rights. Herzog was not a creditor; nor did he claim to appear as attorney for, or to hold

a power of attorney for, any creditor. Herzog's sole status in the arbitration proceeding was that of stakeholder or escrowee. Herzog, in initiating the arbitration, alleged in effect that he was subject to multiple liability as a result of the adverse claims and demands of Robinson and the "accepting" creditors in that the "accepting" creditors demanded a forfeiture pursuant to the Offer of the $50,000 in Herzog's possession and Robinson demanded that the $50,000 be returned to him on the ground that the Offer had expired without acceptance.

Under Federal practice Robinson and the "accepting" creditors, as adverse claimants were "persons needed for just adjudication" of that dispute. In such case the Rules provide that the court "shall order" that they be made parties (FRCP 19(a), 22; 3 A Moore's Federal Practice ¶19.08, 22.14).

Similarly under New York State practice an action by a stakeholder contemplates the joinder of "two or more" adverse claimants (CPLR 1006(a)). "Non-joinder of a party who should be joined. . . is a ground for dismissal of an action without prejudice" (CPLR 1003). A person should be joined as a party where such joinder will afford "complete relief between the persons who are parties to the action" or where such person "might be inequitably affected by a judgment in the action" (CPLR 1001(a)).

Further, it would seem elementary procedural due process that where, as here, there is a dispute involving whether or not there was an acceptance of an Offer or a "meeting of the minds" which permitted an agreement to come into effect and the interpretation of and effect of that agreement that at the very least all of the parties (offerors and "accepting" creditors) to the pur-

ported agreement are necessary parties before the tribunal deciding the dispute.

> "The function of arbitrators is judicial in nature. It is a basic concept of English and American jurisprudence that all judicial proceeding affecting the right and obligations of persons and corporations are conditioned on notice and opportunity to be heard. And this fundamental rule has been uniformly applied to arbitration." Seldner Corporation v. W.R. Grace & Co., 22 F. Supp. 388, 392 (D. Md. 1938)

There is a further compelling reason why the purported acceptors should have been joined. The Commercial Arbitration Rules of the AAA require such joinder by stating that "The AAA shall give notice" of initiation of the proceedings "to the other party" (Section 7). Moreover, "each party" is entitled to notice of the time and place of the hearing (AAA Rules Section 20, cf CPLR 7506 (b)). Failure to follow procedural rules or to grant such notice is a ground for vacating an award of the arbitration (Section 7511 (b), (iv)) , Petrol Corporation v. Groupement D'Achat Des Carburants, 84 F. Supp. 446, 448 (USDC, SDNY, 1949 Rifkind, D.J.).

It is observed that where a valid arbitration clause exists joinder of parties is feasible and relatively simple, expeditious and inexpensive because such joinder can be effected by mail regardless of jurisdiction in which the party joined is located.

The arbitrators' failure to join the "accepting" creditors prejudiced Robinson in that the arbitrators thereby unfairly limited the scope of the proceedings, shirked major questions in dispute, and insured that all questions in dispute would not be able to be resolved in the arbitration.

(i) One such question shirked involved whether Robinson had any residual liability under the Offer, if accepted, to any of the creditors apart from the $50,000 forfeiture. An aspect of this question involved whether Robinson or FRA was to be the obligor of the notes required to effectuate the alternative plans. The arbitrators obviously could not decide this question in the absence of joinder of creditors and the Award is silent on this point.

(ii) Another question shirked involved whether the acceptance of the Offer effected a novation of, or substitution for, FRA's obligations under the Moratorium Agreement and, if so, whether Robinson is entitled to the return of the collateral pledged thereunder. The arbitrators obviously could not decide this question in the absence of joinder of the creditors and the Award specifically states (paragraph 10) that it does not affect that agreement in any way.

(iii) A third question which the arbitrators shirked was which classes of creditors were eligible to participate in the $50,000

forfeiture; that is, whether only the "accepting" creditors were eligible to participate or whether the Award should be distributed to all of the creditors. The Arbitrators could not resolve this question in the absence of joinder and the Award is silent in this respect.

(iv) The Arbitrators also shirked the question as to whether the forfeiture of the $50,000 to Herzog and the payment by Herzog to creditors of any portion thereof would reduce the amount owed by FRA to the creditors. The Arbitrators could not decide this question in the absence of joinder of the creditors and the Award is silent in this respect.

The shirking of these questions by the arbitrators can only expose Robinson to further litigation or arbitration and possibly to multiple liabilities and inconsistent determinations.

The Refusal to Hear Evidence
and the Foreclosure of Evidence.

By failing to join "accepting" creditors the arbitrators foreclosed the presentation of evidence and in effect refused to hear evidence pertinent and material to the controversy. One of the matters in dispute was whether the "accepting" creditors in fact accepted the Offer. One way of testing this acceptance was to join these creditors in the proceeding. To the extent that any of the creditors, upon receiving a demand for arbitration, denied having accepted the Offer, or otherwise moved to stay arbitration, such denial would have assisted the arbitrators and the parties in the determination as to whether the requirements as to acceptance had been met and whether there had been a meeting of the minds. Moreover, the testimony of the creditors was crucial to the determination as to whether there was a "meeting of the minds". Since most of the creditors were located outside of New York State, and therefore outside of the subpoena power of the arbitrators, the failure to join these creditors as parties effectively foreclosed their evidence.

Title 9 USC §10(c) indicates that "refusing to hear evidence pertinent and material to the controversy" constitutes "misconduct" which will justify vacation of an arbitration award.

New York law is in accord.

The Practice Commentary in Book 7B of McKinney's Consolidated Laws of New York, Annotated to CPLR Section 7511(b) 1(i), states, on page 602: 'The word "misconduct" apparently includes refusing to hear evidence pertinent and material to the controversy, which were specifically defined as misconduct in CPA Section 1462(3)' (Section 1462(3) was the earlier New York Practice Section governing vacation of an arbitration award).

S.T. Palay Textile Corporation v. Trio Togs, Inc., 233 N.Y.S. 2d 708, 710, 36 Misc. 2d 646, 648 (1962) involved a proceeding to confirm an arbitration award and a cross-motion to vacate. The court held that the arbitrators were guilty of misconduct under Section 1462(3) [now 7511(b) 1. (i)] in refusing a request for adjournment of hearing so that respondent could produce an absent witness who was to testify as to relevant and material matters. "By refusing the adjournment, the arbitrators, in effect, refused to hear evidence pertinent and material to the inquiry, to the prejudice of respondent, and the refusal constitutes sufficient misconduct to vitiate the award."

In Application of Navarro, 41 N.Y.S. 2d 585, 266 App. Div. 181 (1943) the court refused confirmation of an award because the arbitrator did not adjourn the hearing in order that a party could have an opportunity to secure evidence in the matter. See also Gervant v. New England Fire

Insurance Co., 306 N.Y. 393, 118 N.E. 2d 574 (1954); A & R Construction Co., Inc. v. Gorlin-Akun, Inc. (1973) 41 A.D. 2d 876, 342 N.Y.S. 2d 950.

The Failure to Grant Newly Engaged Counsel Time to Prepare Adequately and the Failure to Direct Depositions

Robinson was prejudiced by the arbitrators' refusal to grant a reasonable time for his newly engaged counsel to prepare for the hearings and by the arbitrators' failure to grant reasonable discovery by ordering the depositions of Herzog and Plotkin prior to the hearings. These refusals and failures prevented overall fairness in the proceeding.

With respect to preparation, it will be recalled that Robinson, Rothman and Plotkin resided in California, that Robinson engaged new counsel on the eve of arbitration and that shortly after such engagement Rothman, Robinson's Los Angeles counsel, was hospitalized for 5 days in Los Angeles, during which period he was unable to prepare for the arbitration. The legal and factual complexities of the case are apparent, and no further discussion is required to demonstrate the need for adequate time to prepare for a contested arbitration. The arbitrators should have granted the requested 3-4 week adjournment to enable Rothman to prepare the case. There would have been no prejudice to any party by such grant.

With respect to the requested deposition of Herzog it will be noted that Herzog's sketchy "Demand for Arbitration"

(13) gave scant inkling of Herzog's claims or testimony necessitating further inquiry. Moreover, Herzog and Plotkin, in Robinson's absence, were the sole draftsmen of the Offer which contained ambiguities requiring interpretation; the Summary, which Herzog alone drafted, was also ambiguous. Herzog was the sole recipient and handler of the "acceptances" many of which were suspicious. Although requested, Herzog refused to submit to deposition on these matters prior to the July 29 arbitration hearing. The arbitrators were advised of the need for discovery and under the circumstances, and as requested, the arbitrators should have ordered the deposition of Herzog. Most of the testimony at the hearing was that of Herzog. There was great inequity in permitting Herzog such a "field day" at the hearing, while not permitting Herzog's deposition to be taken prior to the hearing so that effective rebuttal could be made.

With respect to the requested deposition of Plotkin, Plotkin's testimony was essential as to the negotiations leading up to the Offer and as to the interpretation of the several ambiguities in the Offer. Plotkin, a Los Angeles attorney, was not willing to appear in New York for the hearing, the subpoena power of the arbitrators did not extend beyond New York State. However, Plotkin was willing to be deposed in Los Angeles. Under the circumstances the arbitrators should have ordered the requested deposition of Herzog in New York followed by that of Plotkin in California, so that all

relevant evidence could have been placed before the arbitrators. In this connection, it is noted that Robinson submitted, and the arbitrators entertained, a three page affidavit of Plotkin. However, this affidavit was necessarily incomplete in the absence of a prior knowledge of the details of Herzog's claims.

Although we have been unable to find a specific case involving a request that an award be vacated because of a refusal to adjourn a hearing date because of a newly engaged counsel's need to prepare, the statutory language in 9 USC Section 10(c) that the award may be vacated if the arbitrators "were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown" would clearly cover this situation. Moreover, a failure to postpone on this ground in effect involves a foreclosure of evidence and the authority cited above under that point would support vacation of the award.

Although great discretion is given to arbitrators, if the arbitrators' rulings prevent overall fairness in the proceeding, the award will be vacated. Newark Stereotypers' Union, No. 18 v. Newark Morning Ledger Co., 397 F 2d 594 (3rd Cir. 1969) cert. den 393 U.S. 954.

THE ARBITRATORS IMPERFECTLY EXECUTED THEIR POWERS UPON THE SUBJECT MATTER SUBMITTED BY FAILING TO MAKE AN AWARD THAT WAS

(1) mutual,
(2) definite, and
(3) final.

The Award is not Mutual.

The Award lacks mutuality in that it does not, and cannot, bind the other parties to the Offer, the "accepting" creditors, none of whom was joined in the proceeding.

The Award (119 ¶9) apparently attempts to limit Robinson's liability under the Offer to $50,000 by stating that Robinson shall have no further liability to Herzog. However, it appears that this limitation will be ineffective against "accepting" creditors and that the Award can only work to estop and bind Robinson.

Despite Judge MacMahon's views to the contrary (164), all of these creditors are free to claim, for example, that Robinson rather than FRA, was to deposit the cash and notes necessary to effectuate the two alternative payment plans. These creditors can claim therefore that Robinson has a personal liability to them in excess of $50,000. They are similarly free to claim that the Moratorium Agreement remains in existence and that they are not obligated to return the security pledged thereunder.

The lack of mutuality compels reversal of the judgment and the vacating of the Award.

The Award is not Definite.

The Award is not definite in the respects set forth on pages 18-21 above.

In United Steelworkers of America, AFL-CIO v. Timken Roller Bearing Company, 324 F 2d 738, (6th Cir. 1963), the Court stated that it was not required to enforce an award that was not clear as to its meaning and effect. It remanded the case to the arbitrators. To the same effect see International Brotherhood of Electrical Workers; Local 30[illegible] AFL-CIO v. Olin Corporation, 471 F 2d 468, (6th Cir. 1972).

In La Vale Plaza, Inc. v. R.S. Noonan, Inc., 378 F 2d 569, 573 (3rd Cir. 1967) the court ordered the matter resubmitted to the arbitrators saying, "Where the award, although seemingly complete, leaves doubt whether the submission has been fully executed" resubmission and the clarification of ambiguity is not the redetermination of an issue, but resembles the correction of a mistake and the determination of an issue which the arbitrators had failed to decide.

In Galt v. Libbey-Owens-Ford Glass Company, 397 F 2d 439 (7th Cir. 1968) cert. den. 393 U.S. 925, an award was made with no mention of whether the arbitrators had considered whether a payment clause was subject to arbitration. The District Court referred the matter back to the arbitrators

who answered that the clause was not in the purview of the arbitration clause. The District Court thereupon reserved for its own decision all questions arising out of the payment clause. The Circuit Court approved.

In Ritchie Building Company, Inc. v. Rosenthal, 193 N.Y.S. 2d 483, 9 A.D. 2d 880 (1st Dept. 1959), the arbitration proceedings concerned the payments to be made to subcontractors out of payments on a construction contract. The arbitrators' award made no mention of any subcontractor's lien, and the court found it impossible to determine whether the amount awarded was to be used toward the satisfaction of liens. The court remitted the matter to the arbitrators for clarification.

Application of Zephyr Construction Co., Inc., 182 N.Y.S. 2d 946, 7 A.D. 2d 915 (2nd Dept. 1959) also concerned a construction contract. The arbitration concerned a contractor's claim for extra work and an owner's cross claims that it had been damaged by work delays and that it had made some payments for extra work which had not been credited. The award ordered the payment of $37,052.75 "in full settlement of all claims submitted to arbitration". Special Term refused confirmation of the award, vacated it, and remitted the matter for clarification, "in order that an award issue which shall be mutual, final and definite". The appellate court affirmed.

Pyramid Productions, Inc. v. National Telefilm Associates, Inc. 243 N.Y.S. 2d 170, 40 Misc. 2d 675, (Sup. Ct. N.Y. Co. 1963) concerned an arbitration for an accounting of money due for television rights. An award was made which provided that the Respondent account to the Petitioner in sufficient detail to permit a satisfactory audit by a national firm of independent certified public accountants, and that the determination of these accountants would be binding. The Court held that the arbitrator had delegated his power to decide, which he may not do, and vacated the award and resubmitted it to the arbitrator for determination.

It is observed that in several of the foregoing cases, involving vacation of an award because of an arbitrator's imperfect execution of his powers, the Court exercised its discretion and remanded the case to the arbitrator for corrective measures. Such a course is not appropriate under the circumstances of this case because the arbitrators cannot correct the award and render an award binding upon the "accepting" creditors or the other parties to the Offer without joining these creditors and starting de novo. The same reasoning applies to any corrective measures required due to the arbitrators' misconduct and misbehavior. Moreover, in any de novo proceeding Robinson should not be required to appear again before arbitrators who have previously rendered an Award.

The lack of definiteness compels reversal of the judgment and the vacating of the Award.

The Award is not Final.

The Award does not put an end to litigation, but rather encourages it by its avoidance of, and failure to decide, the issues presented, and by its ambiguities. Indeed in the only respect that the Award purports to be "final", in awarding $50,000 to Herzog (¶1) and permitting him (¶¶5, 6) to foreclose on the collateral to realize this sum, the finality is illusory because of Mari-Jo Robinson's community property interest in the collateral. Mari-Jo Robinson was not joined in the proceeding and Herzog would act at his peril, and be subject to her claims, if he took any steps that would prejudice her rights in the collateral

The lack of finality compels a vacating of the Award.

THE ARBITRATORS EXCEEDED THEIR POWERS IN AWARDING A FORFEITURE OR PENALTY CONTRARY TO PUBLIC POLICY.

The arbitrators exceeded their powers by enforcing the "forfeiture" Provision (7) of the Offer and awarding to Herzog a forfeiture and penalty in the amount of $50,000. The Award directs that Robinson pay Herzog $50,000, but does not direct that this sum be credited against any obligation that Robinson may have to the "accepting" creditors. Indeed the Award states (¶19) that it does not affect the rights of parties under the Moratorium Agreement. It is silent as to

whether it affects the rights of "accepting" creditors of the Offer.

Robinson argued throughout the arbitration (eg 18, R 8 Ex X) that the forfeiture provision of the Offer was an illegal and unenforceable penalty under applicable law.

There was no evidence of any kind that there was any discussion or negotiation between the parties as to the impracticability or difficulty involved in fixing damages, or that the $50,000 forfeiture provision was an attempt by the parties to reach a reasonable pre-estimate of damages. Nor was there any evidence of any kind offered at the arbitration hearing with respect to damages actually suffered.

At the arbitration hearing Herzog testified (Tr 275) and argued that in his view all creditors (that is, "accepting" creditors, as well as all other creditors of FRA including non-media creditors to whom Herzog did not circulate the Summary) were entitled to participate in the $50,000 forfeiture (after compensation which Herzog claimed for his costs and expenses), that the Moratorium Creditors were restored to, or retained their rights, under the Moratorium Agreement (Tr 280) and/or these creditors may be entitled to pursue Robinson for further performance of the Offer. In other words, Robinson is penalized $50,000 plus costs for breaking his "agreement" and non-media creditors to whom Robinson did not even make the Offer are somehow entitled to participate in the $50,000;

the contract (Offer) under which the forfeiture is made "fell" (Tr 280), and the Moratorium Agreement, for which it was a substitute, stands -- or perhaps accepting creditors would still have rights to pursue Robinson or FRA or both. If that does not describe a penalty, then there is no such thing. Yet that is precisely what can occur under the Arbitrators' Award. The forfeiture provision of the Offer can therefore only be seen as a provision for the purpose of injecting fear into Robinson and by way of punishment for default and is accordingly unenforceable.

California law appears to be controlling as to the enforceability of forfeiture since the Offer was negotiated, drafted, signed and delivered in California. Moreover, Robinson is a California resident. Sections 1670 and 1671 of the California Civil Code, in pertinent part, state:

> "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except. . . The parties to a contract may agree therein upon an amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

In California the rule has thus become well established that a mere <u>recital</u> tha damage for breach would be impracticable or difficult to ascertain is not conclusive, and that it is necessary for the party seeking enforcement of such a provision to <u>plead and prove</u> that the facts of the case bring it within

the exception of Civil Code Section 1671. Garrett v. Coast and Southern Federal Savings & Loan Association, 9 Cal. 3d 731, 511 P2d 1197 (1973); Electric Products Corp. v. Williams, 117 Cal. App. 2d Supp. 813, 256 P2d 403 (1953), Witkin, Summary of California Law, 8th Edition, Pg. 339. Further, that a provision for a stipulated sum of damages will be valid, if and only if, at the time the contract is made the damages are in fact difficult to ascertain, that the amount specified must not be an arbitrary sum but must represent a reasonable endeavor by the parties to estimate a fair compensation for any loss sustained by a breach. Clermont v. Secured Investment Corporation, 25 Cal. App. 3d 766, 102 Cal. Rptr. 340 (1972).

In Greenbach Bros. Inc. v. Burns, 245 Cal. App. 2d 767, 54 Cal. Rptr. 143 (1966), a $50,000 deposit was to be retained as liquidated damage in the event of default in the purchase of a hotel for a price in excess of $1,000,000. On defendant's default plaintiff sued for the amount of the deposit. The court held the provision to be unenforceable because the stipulated amount was not a reasonable estimation for compensation of loss, but rather an amount arbitrarily fixed. Similarly, in Cook v. King Manor and Convalescent Hospital, 40 Cal. App. 3d 782, 115 Cal. Rptr. 471 (1974), a $25,000 deposit made in connection with an offer to purchase real property at a price in excess of $2,000,000 was held to be an illegal penalty or forfeiture. This case also held

that the question of illegality of a penalty can be raised at any time, even for the first time on appeal, and that such illegality is based on public policy; it cannot be waived and there can be no estoppel with respect thereto.

The California Supreme Court refused to confirm arbitration awards in favor of unlicensed contractors in the cases of Loving & Evans v. Blick, 33 Cal. 2d 603, 204 P2d 23 (1949) and Franklin v. Nat C. Goldstone Agency, 33 Cal. 2d 628, 204 P2d 37 (1949). In those cases the court refused to enforce an award based upon an illegal contract. In Black v. Cutter Laboratories, 43 Cal. 2d 788, 278 P2d 905 (1955), the California Supreme Court, quoting at great length from Loving & Evans and from Franklin, held that not only were courts not required to enforce an arbitration award based upon an illegal contract, but the court would not enforce an award which was illegal and violated public policy of the state.

Although New York has no statutory prohibition against penalties or forfeitures, the courts of New York have uniformly held penalties to be unenforceable as against public policy, and have created a body of law thereon substantially similar to the law of California. Under that law, the essence of a "penalty" is the payment of a stipulated sum of money to inject fear into the offending party, while the essence of liquidated damages, is a genuine, covenanted pre-estimate of damages. (22 Am. Jur. 2d, Damages Section 213).

See also Jacob Glass, Inc. v. Banca Marmorosch, Blank & Co., 122 Misc. 637, 204 N.Y.S. 636 (1924); Downtown Harvard Lunch Club v. Racso, Inc., 201 Misc. 1087, 107 N.Y.S. 2d 918 (1951); Allen B. DuMont Laboratories, Inc. v. Kane, 68 N.Y.S. 2d 537 (1946); 14 N.Y. Jur., Damages, 167.

New York cases have consistently recited the courts' abhorrence of penalties and forfeitures and the refusal of the courts to enforce illegal agreements and matters against public policy. New York courts have refused to confirm or enforce arbitration awards providing for penalties and forfeitures. "So long as courts are obligated by statute to enforce arbitration awards they should do so, absent a violation of public policy designed to prevent fraud, illegality, over-reaching, or as a device to impose otherwise prohibited penalties and forfeitures." Staklinski v. Pyramid Electric Company, 6 A D 2d 565, 571, 180 N.Y.S. 2d 20, 27 (1st Dept. 1958). The same conclusion was reached in Matter of Aimcee Wholesale Corporation (Tomar Products), 21 N.Y. 2d 621, 289 N.Y.S. 2d 968, 237 N.E. 2d 223, (1968). Matter of Western Union Telegraph Company (ACA), 299 N.Y. 177, 86 N.E. 2d 162 (1949). Professor McLaughlin has noted in his Supplementary Practice Commentary (1968) to CPLR 7501, "the courts will continue to assert exclusive sovereignty over controversies the resolution of which is invested with public interest transcending the concerns of the parties to the dispute." (Emphasis supplied) (McKinney's Consolidated Laws of New York, Book 7B, CPLR §7501, 1974-75 Pocket Part p 154).

The Federal courts as well as the courts of New York and California have consistently refused to enforce contracts which are illegal or violative of public policy. In Hurd v. Hodge, 334 U.S. 24, 68 S. Ct. 847 (1948) the United States Supreme Court announced the principle that, although parties can privately agree to many things, Federal courts will not enforce agreements that conflict with the public policy of the United States. In Local 453, International Union of Electrical, Radio & Machinery Workers v. Otis Elevator Company, 314 F 2d 25 (2nd Cir. 1963) the principle of Hurd v. Hodge, supra, was applied to arbitrations, saying:

> "It is no less true in suits brought under Section 301 to enforce arbitration awards than in other lawsuits that the power of the Federal courts to enforce the terms of a private agreement is. . . subject to the public policy of the United States."

Botany Industries Inc. v. New York Joint Board, Amalgamated Clothing Workers of America, 375 F. Supp. 485, 491 (SDNY 1974 Edelstein, D.J.) concerned an action by an employer to vacate an arbitration award. The court held that the underlying agreement violated "hot cargo" provisions of labor laws and thus vacated the award on grounds of public policy. "If the agreement is void, it is not legitimatized by the arbitral process, and if the agreement is unenforceable, it is not rendered enforceable by an arbitrator's decision."

This Court has observed in Sobel v. Hertz, Warner and Co. (1972) 469 F. 2d 1211, 1214 'if the arbitrators simply ignore the applicable law, the literal application of a "manifest disregard" standard should presumably compel vacation of the Award'.

CONCLUSION

The arbitration proceedings lacked fairness. The Arbitrators' Award did not finally resolve the issues in dispute. The Award is contrary to public policy.

THIS COURT SHOULD REVERSE THE JUDGMENT AND DIRECT THAT THE AWARD BE VACATED.

Dated: August 29, 1975.

Respectfully Submitted,

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ADDENDUM

NY CPLR

§ 1001. Necessary joinder of parties

(a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.

(b) When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:

1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
3. whether and by whom prejudice might have been avoided or may in the future be avoided;
4. the feasibility of a protective provision by order of the court or in the judgment; and
5. whether an effective judgment may be rendered in the absence of the person who is not joined.

NY CPLR

§ 1003. Nonjoinder and misjoinder of parties

Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without him under the provisions of that rule. Misjoinder of parties is not a ground for dismissal of an action. Parties may be added or dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just. The court may order any claim against a party severed and proceeded with separately.

Rule 19. Joinder of Persons Needed for Just Adjudication.

(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

NY CPLR

§ 1006. Interpleader

(a) Stakeholder; claimant; action of interpleader. A stakeholder is a person who is or may be exposed to multiple liability as the result of adverse claims. A claimant is a person who has made or may be expected to make such a claim. A stakeholder may commence an action of interpleader against two or more claimants.

FRCP

Rule 22. Interpleader.

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

NY CPLR

§ 7506. Hearing

(a) Oath of arbitrator. Before hearing any testimony, an arbitrator shall be sworn to hear and decide the controversy faithfully and fairly by an officer authorized to administer an oath.

(b) Time and place. The arbitrator shall appoint a time and place for the hearing and notify the parties in writing personally or by registered or certified mail not less than eight days before the hearing. The arbitrator may adjourn or postpone the hearing. The court, upon application of any party, may direct the arbitrator to proceed promptly with the hearing and determination of the controversy.

(c) Evidence. The parties are entitled to be heard, to present evidence and to cross-examine witnesses. Notwithstanding the failure of a party duly notified to appear, the arbitrator may hear and determine the controversy upon the evidence produced.

(d) Representation by attorney. A party has the right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings which have not taken place. This right may not be waived. If a party is represented by an attorney, papers to be served on the party shall be served upon his attorney.

NY CPLR

§ 7511. Vacating or modifying award

(a) When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

9 USC

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Section 7. INITIATION UNDER AN ARBITRATION PROVISION IN A CONTRACT — Arbitration under an arbitration provision in a contract may be initiated in the following manner:

(a) The initiating party may give notice to the other party of his intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved, if any, the remedy sought, and

(b) By filing at any Regional Office of the AAA two (2) copies of said notice, together with two (2) copies of the arbitration provisions of the contract, together with the appropriate administrative fee as provided in the Administrative Fee Schedule.

The AAA shall give notice of such filing to the other party. If he so desires, the party upon whom the demand for arbitration is made may file an answering statement in duplicate with the AAA within seven days after notice from the AAA, in which event he shall simultaneously send a copy of his answer to the other party. If a monetary claim is made in the answer the appropriate fee provided in the Fee Schedule shall be forwarded to the AAA with the answer. If no answer is filed within the stated time, it will be assumed that the claim is denied. Failure to file an answer shall not operate to delay the arbitration.

Section 20. TIME AND PLACE — The Arbitrator shall fix the time and place for each hearing. The AAA shall mail to each party notice thereof at least five days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

2 - copies Received

5/29/75 12:15 pm.

Robert P. Herzog pro se

by Elizabeth Good